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9 **IN THE UNITED STATES DISTRICT COURT**
10 **FOR THE DISTRICT OF ARIZONA**

11 United Food & Commercial Workers
12 Local 99, et al.,

13 Plaintiffs,

14 - and -

15 Arizona Education Association, et al.

16
17 Plaintiff-Intervenors,

18 vs.

19 Ken Bennett, in his capacity as Secretary
20 of State of the State of Arizona, et al.,

21 Defendants.

Case No: CV11-921-PHX-GMS

**STATE DEFENDANTS' RESPONSE
TO PLAINTIFFS' MOTION FOR
PARTIAL SUMMARY JUDGMENT
RE: SB 1365**

22
23 **Introduction**

24 Defendants Tom Horne and Ken Bennett hereby respond to Plaintiffs' Motion for
25 Summary Judgment regarding SB 1365. (Doc. 158.) As discussed in Defendants' own
26 motion (doc. 166), SB 1365 is a legitimate exercise of the State authority and is not in
27 conflict with or otherwise preempted by federal law. Defendants incorporate by
28

reference their earlier arguments concerning preemption, but wish to address a few points raised in Plaintiffs' motion.

I. LEGAL DISCUSSION

A. The Court Should Decide the Preemption Issue if Necessary to the Determination Whether to Grant a Permanent Injunction.

Plaintiffs devote much of their motion to arguing that the Court should decide whether SB 1365 is preempted. Defendants assert that the Court should decide the preemption issue only if necessary to the determination whether to grant a permanent injunction.

Courts should avoid unnecessary and broad adjudication of constitutional issues. *See Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not pass on constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of."); *American Foreign Serv. Ass'n v. Garfinkel*, 490 U.S. 153, 161 (1989) (stating that district court should not pass on constitutional question unless it was imperative); *Communist Party v. Whitcomb*, 414 U.S. 441, 452 (1974) (Powell, J., concurring); *Thompson v. Oklahoma*, 487 U.S. 815, 858 (1988) (O'Connor, J., concurring). When a plaintiff obtains the relief requested based on other grounds, a court should not reach constitutional issues. *United Seniors Ass'n v. Shalala*, 182 F.3d 965, 969-70 (D.C. Cir. 1999); *Carhart v. Stenberg*, 972 F. Supp. 507, 509 (D. Neb. 1997).

In this case, the Court found that the Plaintiff-Intervenors were likely to succeed on their claim that SB 1365 violated the First Amendment and on that basis the Court granted a preliminary injunction. (Doc. 99.) The State asserts that SB 1365 does not violate the First Amendment. If in deciding the merits the Court concludes there was no violation of the First Amendment, the Court should decide whether relief is warranted on some other ground. If the Court affirms the preliminary ruling of a First Amendment violation, the Court need not and should not decide any other constitutional issues.

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2 **B. The Statute is Not Preempted**

3 Plaintiffs' argument rests entirely on *SeaPak v. Industrial, Technical &*
 4 *Professional Employees*, 300 F. Supp. 1197 (S.D. Ga. 1969); *aff'd*, 423 F.2d 1229 (5th
 5 Cir. 1970), *aff'd w/o op.*, 400 U.S. 985 (1971). But *SeaPak* is not controlling.

6 First, *SeaPak* is not the law of the land. It is a ruling from another district court
 7 nearly a half century ago. True, the judgment was summarily affirmed by the Supreme
 8 Court. A "summary affirmance settles the issues for the parties" and demonstrates the
 9 Supreme Court's approval of the judgment of the lower court. *Fusari v. Steinberg*, 419
 10 U.S. 379, 392 (1975). But a summary affirmance does not necessarily mean that the
 11 Court "adopted the reasoning as well as the judgment" of the lower court. *Mandel v.*
 12 *Bradley*, 432 U.S. 173, 176 (1977). Given the Supreme Court's failure to endorse the
 13 reasoning of the district court, the *SeaPak* decision is non-binding.

14 *SeaPak* is also unpersuasive. Its dictum that that § 302©(4) of the LMRA is
 15 clearly incorrect. Also incorrect is the contention that SB 1365 conflicts with federal
 16 law, since federal law does not require that check-off authorizations be irrevocable.

17 **II. CONCLUSION**

18 For the foregoing reasons, the Court should deny Plaintiffs' Motion for Summary
 19 Judgment (doc. 158).

20 Respectfully submitted this 6th day of September, 2012.

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 27
 28

1 I hereby certify that on September 6
2 2012, I electronically transmitted the
3 attached document to the Clerk's Office
4 using the CM/ECF System for filing and
transmittal of a Notice of Electronic
Filing to all ECF registrants.

5 s/Michael Goodwin

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